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In the Supreme Court of the United States

OCTOBER TERM, 1986

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

OUTBOARD MARINE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The question presented for review is whether Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9604, which authorizes the Environmental Protection Agency to take response actions to clean up releases of hazardous substances, authorizes access to private property to design and implement the remedial action. Respondent Outboard Marine Corporation opposes review of this question on the basis that CERCLA does not authorize such access absent a showing of imminent and substantial endangerment, and on the basis of several peripheral issues.

1. Respondent contends (Br. in Opp. 7-9) that no public purpose would be served by permitting EPA access to its property because there is no imminent and substantial danger to the public health or welfare. As we explain in our petition (at 10-12), however, Section 104 was enacted precisely to provide an alternative to the relief available, upon a showing of imminent and substantial endangerment, through Section 106. Since EPA sought access to respondent's property under Section 104(a)(1)(A),[1] there was no need to establish the existence of any imminent and substantial endangerment.[2]

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[1] We note that while respondent states (Br. in Opp. 5) that EPA acted "without warning to OMC," EPA repeatedly attempted to obtain voluntary access for design work, and sought a warrant only after the negotiations failed (Pet. App. 3a-5a).

[2] Section 104(a)(1) of CERCLA authorizes EPA to act whenever "(A) any hazardous substance is released or there is a substantial threat of such a release into the environment, *or* (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare" (emphasis supplied). Respondent does not dispute that there has been a release of PCBs, which are hazardous substances under CERCLA. Section 101(14) of CERCLA, 42 U.S.C. 9601(14), defines hazardous substances to include substances regulated under several other statutes and includes toxic pollutants listed and substances designated under Sections 307(a) and 311(b)(2)(A) of the Federal Water Pollution Control Act, 33 U.S.C. 1317(a) and 1321(b)(2)(A). PCBs are listed as toxic pollutants under Section 307(a), 40 C.F.R. 401.15, and designated as hazardous substances under Section 311, 40 C.F.R. 116.4. PCB also has been designated as a hazardous substance under Section 102 of CERCLA, 42 U.S.C. 9602. See 40 C.F.R. 302.4.

Respondent also incorrectly asserts that we have conceded that the PCB contamination produced by respondent[3] has "no identifiable adverse effects whatsoever" (Br. in Opp. 9), relying on responses to requests for admissions filed in September 1982. Those responses stated only that at that time no individual had been identified who had been harmed by respondent's release of PCBs, and that the air in the area and the drinking water of Waukegan, Illinois were safe (Br. in Opp. App. C). As the court of appeals recognized in affirming the government's voluntary dismissal of its Section 106 action, the government "did not admit that the PCB then present would not cause a significant health problem to humans in the future, or that the PCB did not present a present risk to the ecological life of the harbor or Lake Michigan, or that the PCB will not harm the fish and aquatic life in the area." *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 505 (7th Cir. 1986). Indeed, there is abundant evidence that PCBs have a variety of toxic effects on humans and other organisms, and are extremely persistent in the environment. See 47 Fed. Reg. 37342, 37344 (1982); *United States* v. *Commonwealth Edison Co.*, 620 F. Supp. 1404, 1406 (N.D. Ill. 1985) (summarizing effects). It is accordingly not surprising that PCBs are defined as hazardous substances under CERCLA (see note 2, *supra*).

Respondent suggests that EPA has no need for access under Section 104 because it may proceed un-

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[3] Although respondent attempts (Br. in Opp. 8) to suggest that it is merely a disinterested observer of the PCB contamination of Waukegan Harbor, respondent does not dispute that its operations were the source of the PCBs now dispersed on its property and in the Harbor. See, *e.g.*, Br. in Opp. 3-4.

der Section 106, 42 U.S.C. 9606, on a showing of imminent and substantial endangerment (Br. in Opp. 10-11). Congress, however, established two separate approaches for addressing hazardous waste contamination, with differing methods and standards for taking action.[4] Section 106 authorizes EPA to compel private parties to conduct their own cleanup, where there is an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance.[5] Section 104, in contrast, authorizes EPA to undertake cleanups whenever there is a release or substantial threat of release of a hazardous substance. The availability of relief under Section 106 in appropriate cases does not negate EPA's right to act, and to obtain access, under Section 104 in other situations.

The court of appeals' interpretation of Section 104 leaves EPA in virtually the same disadvantageous position it was in before Congress enacted Section 104. Under earlier statutes,[6] EPA had the authority to regulate hazardous waste disposal sites and to

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[4] The court of appeals recognized the distinctions between Sections 104 and 106 in its subsequent affirmance of EPA's decision to dismiss its injunctive action against OMC, including a Section 106 count, and to conduct its own PCB cleanup under Section 104. *United States* v. *Outboard Marine Corp.*, *supra*.

[5] Respondent errs in asserting (Br. in Opp. 10) that "EPA's claims that Section 106 provides it with no authority to obtain access to remedial sites." EPA has not and does not so claim (see Pet. 11).

[6] *E.g.*, Solid Waste Disposal Act, as added by the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (42 U.S.C. (& Supp. II) 6901 *et seq.*).

bring suit to force cleanup by responsible parties, but it lacked the clear legal authority to respond to hazardous substance threats without establishing liability and obtaining an injunction to force cleanup by the responsible party. Section 104 of CERCLA was designed to remedy this situation by providing EPA with both the authority and the funding mechanisms necessary to undertake hazardous substance cleanups on its own, without requiring a showing of imminent and substantial endangerment. By limiting EPA's access authority to that available under the imminent and substantial endangerment standard of Section 106, the court of appeals would turn back the clock. As was the case before CERCLA's enactment, the court of appeals' holding would take away EPA's ability to respond to the release or threat of a release of a hazardous substances before the need for action becomes acute, and again allow EPA's response to be delayed by complex and lengthy legal proceedings.[7] As explained in our petition (at 8-14), prompt access is critical to EPA's ability to protect the public and the environment through remedial action under Section 104 and is implicit in the broad authority granted by that Section. It is inconceivable that Congress would have created direct response authority and established a $1.6 billion Trust Fund primarily to support such responses without intending that EPA could enter private property—with or without the consent of the landowner—to undertake remedial actions necessary to protect public health and the environment.

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[7] OMC's vague reference (Br. in Opp. 10-11) to "state powers over private property * * * available to the EPA" similarly ignores Section 104's clear mandate. Congress authorized EPA to act on its own authority under CERCLA, not to have to rely on whatever state powers may be available.

2. In urging that its Waukegan Harbor facility is not a "typical contaminated Superfund site" (Br. in Opp. 8), respondent attempts to deflect the Court's attention from the facts that the property *is* contaminated and that respondent is the source of the contamination in Waukegan Harbor. See, *e.g.*, *id.* at 4. Respondent is not, as it seems to suggest, simply some unaffected bystander whose property is to be enlisted in efforts to clean up a situation for which it bears no responsibility. In this context, respondent's efforts to subdivide its property into contaminated and uncontaminated portions is singularly unpersuasive; nothing in CERCLA suggests that EPA's authority to respond to a release is limited to the contaminated portions of the responsible party's property. As the district court recognized, "it cannot be argued that the EPA is limited in its planning investigation only to those areas contaminated by PCBs. Since the response authority includes the construction of on-site structures, the search of appropriate areas contiguous to contaminated areas, especially where the contaminated areas are bodies of water, for purposes of such construction is proper" (Pet. App. 33a-34a). The court of appeals did not disagree (Pet. App. 9a).

Respondent's related suggestion that CERCLA "was passed *primarily* as a response to abandoned and inactive waste sites, which were not covered under prior law" (Br. in Opp. 12 (emphasis added)), even if correct, does not establish that it applies *only* to such sites, and the statutory language is flatly inconsistent with such a limitation. Section 104(a)(1)(B) refers to the "owner or operator of the vessel or facility from which the release emanates," and Section 101(9)(B), 42 U.S.C. 9601(9)(B), defines "facility" to include "*any* site or area where a hazardous substance has been deposited, stored, disposed of, or

placed, or otherwise come to be located; but [it] does not include any consumer product in consumer use or any vessel" (emphasis added). In light of this broad definition with its very narrow exceptions, Congress could not have intended to limit the scope of the Act to abandoned or inactive sites.

3. Finally, respondent asserts that EPA's exercise of its response authority under Section 104 to implement a remedy on respondent's property constitutes an unauthorized taking of that property.[8] As explained in our petition (Pet. 14 n. 20) and above, EPA's entry and remedial work on respondent's property are actions authorized under Section 104 and any taking claim alleged to arise from EPA's exercise of its Section 104 authority must be brought pursuant to the Tucker Act, 28 U.S.C. 1346, 1491.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.[9]

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[8] Contrary to respondent's implications (Br. in Opp. 5-6), the proposed cleanup actions are narrowly tailored to correct the situation created by respondent's failure to control the hazardous substances it uses, and nothing in this record suggests otherwise.

[9] There have not as yet been significant developments in Congress, beyond those described in our petition (at 16-17 & n.22). We will promptly inform the Court of future legislative action affecting this case.

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